IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEPHEN J. GRABOWSKI, JR. and, CONNIE GRABOWSKI, his wife	)	
Plaintiffs,	)	
v.	)	C.A. No. 02C-10-118-PLA
WILLIAM MANGLER, DAVID SMITH, and JOSEPH ZIEMBA	)	
Defendants.	)	

Submitted: December 15, 2006
Decided: January 17, 2007

UPON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.
GRANTED.

Gary S. Nitsche, Esquire, Weik Nitsche Dougherty & Componovo, Wilmington, Delaware. Attorney for Plaintiffs.

Joseph A. Gabay, Esquire, Maron & Marvel, P.A., Wilmington, Delaware. Attorney for Defendant William Mangler.

Nancy Chrissinger Cobb, Esquire, Chrissinger & Baumberger, Wilmington, Delaware. Attorney for Defendant David Smith.

Robert K. Pearce, Esquire, Ferry Joseph & Pearce, P.A., Wilmington, Delaware. Attorney for Defendant Joseph Ziemba.

ABLEMAN, JUDGE

I.

Before the Court are three Motions for Summary Judgment filed by William Mangler ("Mangler"), David Smith ("Smith"), and Joseph Ziemba ("Ziemba") (collectively "Defendants") in this action involving a workplace prank gone awry.[1] Smith and Ziemba have specifically asked the Court to grant summary judgment on the basis of the "exclusivity" provision under DEL. CODE ANN. tit. 19, § 2304 ("Section 2304") of the Delaware Workers' Compensation Act ("Act"), which bars an employee from suing a fellow employee for injuries sustained when employed by the same employer and acting within the course of employment. Mangler has filed a "Notice of Joinder" incorporating the arguments and authority contained in the memoranda filed by his co-defendants.[2] For the reasons that follow, Defendants' Motions for Summary Judgment are **GRANTED**.

II.

In October 2000, Plaintiff Stephen J. Grabowski, Jr. ("Grabowski") and Defendants were employed by J.J. White, Inc. ("J.J. White") as pipe fitters and welders. The nature of their work was such that there were extended periods of down-time between jobs in which they would have very

[1] *See* Dockets 72, 73, 74, 75.

[2] *See* Dockets 74, 75.

little to do. During these periods of inactivity, in an effort to pass the time, Grabowski and Defendants would often engage one another in practical jokes and pranks. On one occasion, Defendants caught Grabowski in a bathroom at the job site and wrapped him in duct tape. This was done as a practical joke in an effort to get back at Grabowski for his prank of putting water into Smith's hard hat. Grabowski, however, was injured as a result of being duct-taped. He subsequently applied for and received workers' compensation benefits, and later filed this action against Defendants for the same injuries he sustained from that incident.[3]

III.

Defendants have moved for summary judgment. They argue that the "exclusivity" provision under Section 2304 of the Act precludes Grabowski from bringing this action. Specifically, Defendants contend that the acts of "horseplay" they engaged in while on the job, specifically the act of duct-taping Grabowski, were within the course and scope of their employment with J.J. White. Therefore, according to Defendants, because Grabowski's injuries arose "out of and in the course of" his employment, the Act is his exclusive remedy pursuant to Section 2304.

[3] *See* Docket 72, p. 3; Docket 73, p. 2.

Grabowski responds that the "horseplay" engaged in by the parties was not within the course and scope of their employment. As support, Grabowski asserts that J.J. White specifically forbids its employees from engaging in "horseplay," that Defendants were aware of J.J. White's rule against such conduct, and that J.J. White was unaware that the parties were continuously engaging in this conduct. Grabowski, therefore, concludes that any "horseplay" which occurred is a complete deviation from the parties' work activities and, as such, the parties' conduct was outside the scope of employment. Accordingly, Grabowski maintains that this action is not precluded under Section 2304.

IV.

When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and determine whether a party is entitled to judgment as a matter of law. Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate. If,

however, there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law, summary judgment will be granted.[4]

The moving party bears the initial burden of demonstrating that the undisputed facts support its legal claims. Should the moving party make such a showing, the burden shifts to the non-moving party to demonstrate that genuine issues of material fact exist.[5]

V.

The Act is the "exclusive remedy available to an employee to secure compensation from an employer for work-related injuries."[6] As Section 2304 provides:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

Therefore, Section 2304 effectively "precludes all employee actions against the employer to recover for personal injuries, irrespective of the liability character of the tort."[7]

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[4] *See* SUPER. CT. CIV. R. 56; *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. Ct. 2005); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5] *See Storm*, 898 A.2d at 879-880; *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del. Super. Ct. 2006).

[6] *Dockham v. Miller*, 1997 WL 817873, at *2 (Del. Super. Ct. May 21, 1997).

This preclusion also extends to co-employees of the injured claimant when "the employee stands in the place of the employer."[8] That is, a co-employee is excluded from a claimant's actions when, at the time the injury occurred, the co-employee was "acting within the course or scope of his employment."[9] The rationale for extending an employer's exclusion to a co-employee is because an injury caused by a co-employee in the course or scope of his employment is compensable under the Act.[10]

In determining whether a co-employee was acting within the course or scope of his employment when the injury to the claimant occurred, the Court "generally look[s] to the time, place, and circumstances of the injury."[11]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* DEL. CODE ANN. tit. 19, § 2363(a); *Groves v. Marvel*, 213 A.2d 853, 855 (Del. 1965) ("The purpose of § 2363(a), and like enactments, is to exclude co-employees from the category of 'third persons' who may be sued by an injured employee, and thus to bar common law negligence suits against co-employees by fellow employees or by subrogated employers in connection with compensable injuries. It appears that the employer's immunity from suit has been legislatively extended to co-employees in a number of states on the theory that, as part of the *quid pro quo* in the compromise of rights which forms the basis of workmen's compensation, employees are entitled to freedom from negligence suits for compensable injuries. The rationale for such legislation seems to be that by becoming employed in industry, the worker multiplies the probability of not only injury to himself but also liability to others; and if he is exposed to ruinous suits for damages by co-employees, the beneficent effects of workmen's compensation are too drastically reduced.").

[11] *Dockham*, 1997 WL 817873, at *3.

This requires a focus on three factors: (1) whether the co-employee's act causing the injury was an accident or a willful act; (2) whether the injury was directed against claimant as an employee or because of claimant's employment; and (3) whether the injury was directed against the claimant because of personal reasons.[12]

Delaware courts have not expressly applied these factors to a situation involving an employee/claimant injured as the result of horseplay. And the "case law, as it relates to horseplay injuries in the workplace, is sparse[.]" Nonetheless, this Court has held that "[i]njuries that occur as a result of a *claimant's* horseplay are considered outside the course of employment."[13] Specifically, under "Delaware law, … an employee who participates [in] horseplay, which is prohibited by the employer, may not recover [under the Act] for injuries suffered as a result of horseplay, since the activity is determined to be outside the course and scope of employment."[14] However, "an employee not participating in such horseplay may recover [under the

[12] *See id.*; *Ward v. General Motors Corp.*, 431 A.2d 1277, 1280 (Del. Super. Ct. 1984).

[13] *Cave v. Perdue Farms, Inc.*, 1995 WL 562156, at *4 (Del. Super. Ct. Aug. 28, 1995) (emphasis supplied).

[14] *Seinsoth v. Rumsey Elec. Supply Co.*, 2001 WL 845661, at *1 (Del. Super. Ct. Apr. 12, 2001).

Act] for injuries sustained as a result of another employee's horseplay."[15] Stated diffeently, a "non-participating victim of 'horseplay' may recover compensation[]" under the Act.[16]

In *Gen. Foods Corp. v. Twilley*,[17] the "unrefuted testimony" showed that the employee/claimant was at her work station when she was hit on the head by an aluminum-foil ball about the size of a softball. "Although the employee testified that she had participated in the ball-throwing activity in the past, the [Industrial Accident] Board found that on the date of the incident she was a non-participating victim of such activity."[18] The Board, therefore, awarded the claimant workers' compensation benefits because a non-participating victim of "horseplay" may recover compensation. On appeal, the Delaware Supreme Court determined that "[t]here is no evidence

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[15] *Id.*

[16] *Gen. Foods Corp. v. Twilley*, 341 A.2d 711 (Del. 1975). *See also Lomascolo v. RAF Indus.*, 1994 WL 380989, at *2 (Del. Super. Ct. June 29, 1994) ("While Appellant's injury occurred on Appellee's premises, during work hours, and at the location where Appellant was scheduled to be in order to perform his duties, Appellant's horseplay cannot be deemed to have arose out of or within the course of his employment. Appellee's work rules prohibit horseplay on the work site. Appellant was aware of these safety rules and was acting in contravention of them when he was injured.").

[17] 341 A.2d 711.

[18] *Id.* at 711.

that the employee was a participant in the 'horseplay' at the time of the accident" and, as such, affirmed the Board's decision.[19]

In this case, as was the situation in *Twilley*, the parties' deposition testimony clearly illustrates that Grabowski was a "non-participating victim" of the Defendants' horseplay. Grabowski testified that when he went to use the bathroom at the job site, he was grabbed from behind and was forcefully placed on the ground and held there by Defendants while he was being duct-taped.[20] Defendants' testimony reiterates Grabowski's account of what transpired in the bathroom, which is that Defendants surprised Grabowski from behind and took him to the ground with force.[21] Defendants have also testified that Grabowski had no prior knowledge of Defendants' plans to

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[19] *Id.*

[20] *See* Docket 72, Ex. A, Grabowski Dep., p. 60-61:

> A. I went in. I said, "[Mangler], I got to use the bathroom." And so I used the urinal. I turned around to grab my hard hat off the sink, and he somehow got behind me and suckered me, not sucker punched me but suckered me, picked me up from behind and threw me on the ground. And Ziemba and Smith were … watching. And then as soon as he got me down on the ground they jumped on me.
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> ***
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> Q. So now Mr. Mangler has grabbed you and put you on the ground, and then what happens?
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> A. He didn't put me on the ground. He body slammed me on the ground. He held me down, and held me, was holding me real tight, and them other guys started to wrap me with tape, and they took turns back and forth wrapping. Ziemba and Smith was wrapping first. And then one of them, I don't know which one it was, but they stopped wrapping and held me, and then Mangler started wrapping me.

[21] *Id.*, Ziemba Dep., p. 20:

duct-tape him and that he never consented to such action.[22] Although the record indicates that Grabowski had engaged in similar horseplay on previous occasions while employed at J.J. White,[23] the parties' testimony confirms that Grabowski was not a willing and active participant in the horseplay engaged in by Defendants on the date of the incident in question.

> A. As we are washing our hands, [Mangler] came in with [Grabowski]. [Grabowski] went to the bathroom … and then started washing his hands. And [Mangler] came up from behind him, grabbed him around his shoulders, grabbed his legs. We laid him on the floor. [Smith] taped his legs up, taped his hand by his waist, by his elbows.

Id., Smith Dep., p. 11:

> A. So he comes into the [bathroom] trailer. [Mangler] grabs him around his arms. I believe Mr. Ziemba grabbed him by his feet. They laid him down on the ground. I started to duck tape his legs[.]

Id., Mangler Dep., p. 15:

> A. And we went in [to the bathroom.] … I relieved myself and I know he [Grabowski] relieved himself and he went over and washed his hands. And he was just about done washing his hands, I grabbed him around his arms and Joe grabbed him by his feet and we laid him down.

[22] *Id.*, Ziemba Dep., p. 21-22:

> Q. … Would you agree with me that Mr. Grabowski had no idea that you were going to duck tape him?
> A. I would imagine he didn't.
> Q. He did or didn't?
> A. Did not.
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> ***
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> Q. And at any point in time did Mr. Grabowski consent to being taped up?
> A. No

Id., Smith Dep., p. 15:

> Q. Did you get the impression that Mr. Grabowski wanted you to tape him up?
> A. I am sure he didn't say, Hey, can you guys duck tape me up? But no.

[23] *Id.*, Grabowski Dep., p. 62.

He was merely the subject of Defendants' horseplay and ultimately, like the claimant in *Twilley*, became the victim of such horseplay after he sustained injuries as a result of Defendants' actions. Grabowski, therefore, can *only* be described as a "non-participating victim." Accordingly, because a "non-participating victim of 'horseplay' may recover compensation"[24] under the Act, he is precluded from maintaining this action pursuant to the "exclusivity" provision of Section 2304.

VI.

For the foregoing reasons, Defendants' Motions for Summary Judgment are **GRANTED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

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[24] *Twilley*, 341 A.2d at 711.